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IN THE
Supreme Court of the United States

October Term, 1944 — No. 1121

In the Matter
of
CHILD'S COMPANY, DEBTOR.

In Proceedings for Reorganization under Chapter X
of the Bankruptcy Act — No. 82,868

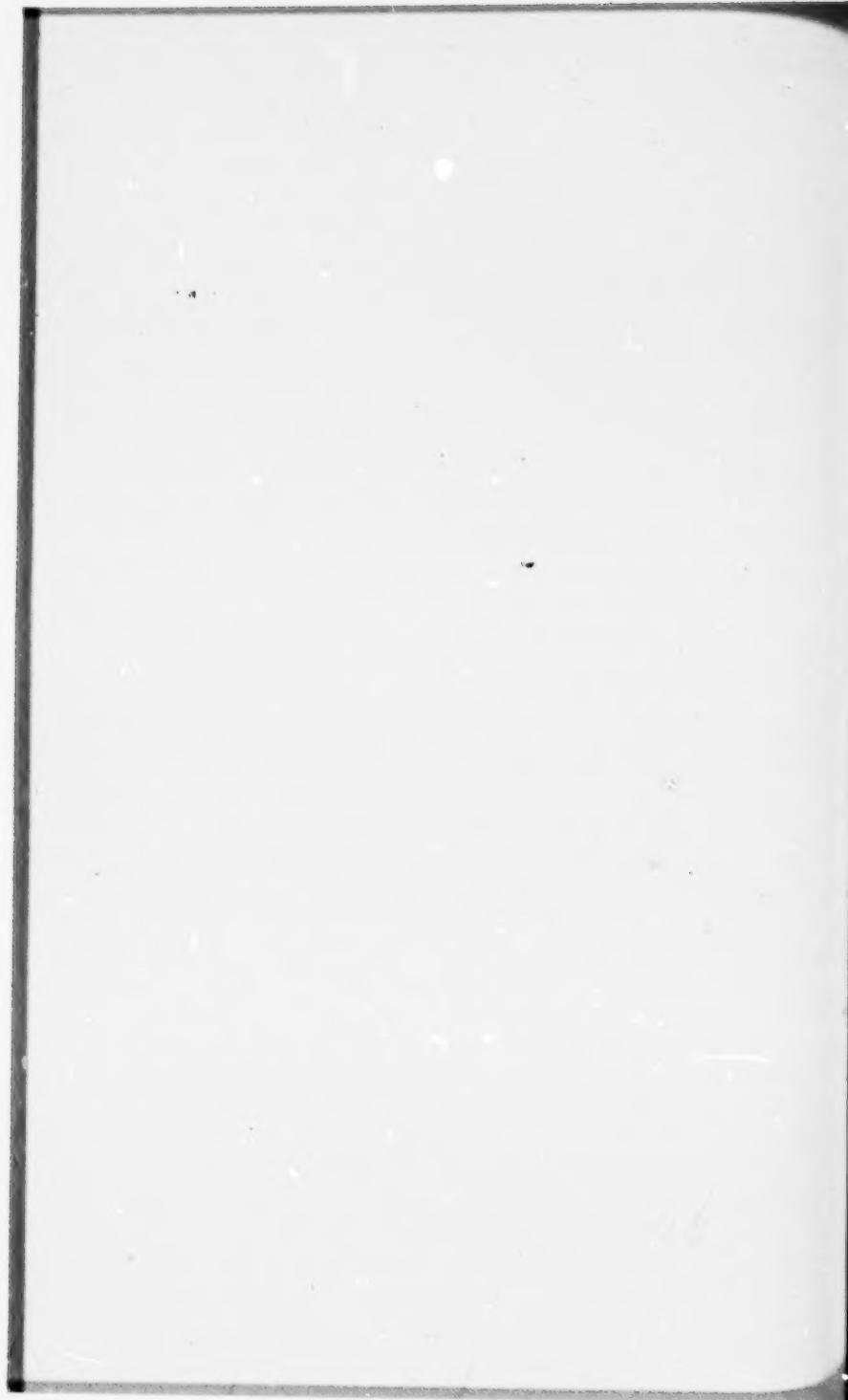
JOHN F. X. FINN, as Trustee of CHILD'S COMPANY,
Petitioner,
against

THE 415 FIFTH AVENUE COMPANY, INC.
Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT and BRIEF
IN SUPPORT OF PETITION**

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JOHN F. X. FINN, as Trustee of CHILDS COMPANY,
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THE 415 FIFTH AVENUE COMPANY, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals For the Second Circuit

Your petitioner, John F. X. Finn, as Trustee of Childs Company, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review a decree of that Court entered in the above entitled proceeding on January 16, 1945. The decree affirmed an Order of the United States District Court, dated September 27, 1944, which granted a petition of the respondent and adjudged that all rights of petitioner and of Childs Company under a lease dated May 19, 1931, covering the

premises at 1551 Broadway, New York City, had terminated and come to an end by virtue of the exercise by the landlord of an option to terminate said lease under the provisions of a "bankruptcy clause" therein (R. 288-292).

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 146 Fed. 2d, 592. The opinion of the United States District Court for the Southern District of New York (R. 288-92) has not been reported.

I

Summary and Short Statement of the Matter Involved

Childs Company, the Debtor, is engaged in the business of operating a chain of restaurants. On May 19, 1931 it entered into a sixteen-year lease covering the premises 1551 Broadway, New York City (Ex. 2; R. 6, 7, 237). The Debtor conducted a restaurant upon the ground floor of that property and sublet the upper floors. It has a heavy investment in improvements and equipment in the leasehold (R. 21). The lease contains a provision granting the lessor an option to forfeit the lease in the event, *inter alia*, that a "Trustee be appointed for the lessee's property" (R. 237-8).

On August 26, 1943, the Debtor filed a voluntary petition for its reorganization under Chapter X of the Bankruptcy Act in the United States District Court for the Southern District of New York, and on that day John F. X. Finn was appointed trustee of the Debtor by Order of the said Court (R. 273).

On June 23, 1944, approximately ten months after the filing of the petition for reorganization of the Debtor, the landlord served upon the Debtor a notice of the exercise of its option under the above provision to terminate the lease (R. 235).

Thereafter, by petition verified July 5, 1944, The 415 Fifth Avenue Company, Inc., the respondent landlord, filed a petition in the United States District Court, Southern District of New York, praying for an order adjudging that the lease of the Debtor had been terminated and directing the trustee of the Debtor to surrender possession of the premises to the landlord. The ground of the application was the filing of a petition for reorganization, as above set forth, and the appointment of the petitioner as trustee of the Debtor, which the landlord claimed was in violation of the forfeiture provision of the lease (R. 6-8).

The petition of the landlord was referred by Judge Edward A. Conger, in charge of the reorganization proceeding, to Hon. Robert P. Stephenson, as Special Master, to hear and report to the Court (R. 37-38). The Special Master recommended that the relief requested in the petition be granted (R. 272-5). The District Court adopted the Special Master's findings of fact and conclusions of law and granted the relief prayed for in the petition (R. 293-5). The Circuit Court of Appeals affirmed the order of the District Court.

Between December 6, 1943 and February 7, 1944 negotiations were conducted between the attorneys for the trustee and the attorneys for the lessor (R. 273). On January 28, 1944, at a meeting between the attorneys for the respective parties, the trustee was requested by the landlord's attorneys to assume the lease on its then terms (Ex. M, R. 265). In response thereto, the petitioner's attorneys made a proposal for a modification of the lease so as to provide a lower base rental plus a percentage of sales more favorable to the landlord than the existing lease (R. 279-80). In answer thereto, the attorneys for the landlord represented, as found by the Special Master, that:

"The desirability of a lease providing for a rental which depended upon earnings would depend, to a large extent, upon the management of the Childs Com-

pany, and this could not be known until it was known who was going to manage the Childs Company upon reorganization, and that in any event there was no need to hurry and that it would be preferable to wait until the reorganization proceeding was further along, and that he would subsequently communicate with Mr. Lorenz (petitioner's attorney) regarding this matter" (R. 274, 275).

These representations as to the lessor's intent were fraudulent. They were relied upon by petitioner, and his position was changed to his detriment as a result thereof (R. 121).

The Circuit Court of Appeals took the position that this misrepresentation was immaterial because there was not also a "representation that the lessor would not exercise its power of termination if it should later reject the trustee's offer."

The facts as found by the Special Master were confirmed by the District Court, and are not in dispute. Petitioner contends, however, that the legal conclusions of the Court, from the established facts, are erroneous.

II

Reasons Relied Upon For the Granting of the Writ of Certiorari

1. The decision of the Circuit Court of Appeals in holding that the landlord's misrepresentations of its intentions did not constitute the basis of an estoppel is contrary to the controlling law of the State of New York, and thus contravenes the doctrine of *Erie v. Tompkins*, 304 U. S. 64.

2. The decision of the Circuit Court of Appeals that in a Reorganization Proceeding, a delay of ten months by

a landlord in exercising an option to forfeit a lease by virtue of the institution of reorganization proceedings, does not constitute a waiver of such right, is erroneous as a matter of law. Such a rule would seriously impede the administration of corporate reorganizations under Chapter X of the Bankruptcy Act, and is contrary to well established principles laid down by the Supreme Court. This question involves an important principle affecting corporate reorganization and should be determined by this Court.

WHEREFORE your petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court; that the decree of the Circuit Court of Appeals for the Second Circuit be reversed; and that petitioner be granted such other and further relief as may be just and proper.

Dated: New York, April 5, 1945.

JOSEPH LORENZ
Counsel for Petitioner